Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. PETITIONER SHOULD HAVE RECEIVED NOTICE AND AN OPPORTUNITY TO RESPOND TO THE LOWER COURT'S INTENT TO DENY RELIEF BASED UPON PROCEDURAL DEFAULT

Respondent concedes that the federal courts should, as a general rule, afford a petitioner an opportunity to respond to a court's intent to invoke a procedural default bar.[1] *See* Respondent's Brief at 45-46. In defending the court of appeals' failure in this regard, the Respondent relies on the Second Circuit's opinion in *Femia v. United States*, 47 F.3d 519 (2nd Cir. 1995), for the proposition that *sua sponte* dismissal of a habeas petition without prior notice is permissible where the petition, when viewed in the context of all prior proceedings, reveals no actual prejudice that would entitle the petitioner to relief, even

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[1] In a footnote, the Respondent argues that the Petitioner's arguments regarding the court of appeals' error in invoking the procedural default *sua sponte* without first giving the Petitioner notice and an opportunity to address the issue are not fairly encompassed in the question presented to this Court for review. Brief for Respondent at 44, n. 30. Supreme Court Rule 24.1(a), cited by the Respondent, provides that "the brief may not raise additional questions or change the substance of the questions already presented" in the petition for a writ of certiorari or the jurisdictional statement. Additionally, however, Rule 14.1(a), provides: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The argument that if a federal court does intend to invoke *sua sponte* a waived defense of procedural default it must give the petitioner notice and an opportunity to be heard is a subsidiary issue fairly included in the issue of whether the court of appeals is required to invoke *sua sponte* the issue of procedural default.

if cause were shown.[2] Brief for Respondent at 47. Citing to *Custis v. United States*, 511 U.S. 485 (1994), the Respondent then concludes that "the Fifth Circuit could have properly found that the record before it clearly indicated no actual prejudice." Brief for Respondent at 47. This is sheer speculation on the Respondent's part.[3]

Respondent further argues that the Petitioner fails to articulate "how the Fifth Circuit's action is fundamentally unfair by the *sua sponte* invocation of procedural default," Brief for Respondent at 28. Respondent, nevertheless, concedes that "neither party to this litigation *expected* that

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[2] In *Femia*, which involved a dismissal for abuse of the writ, the Second Circuit upheld the dismissal without prior notice to the petitioner because the petition, when viewed in the context of the prior habeas proceedings, revealed no actual prejudice. 47 F.3d at 524. However, the court was careful to note that "[i]f the lack of actual prejudice in such a case is not clearly manifest from the record, the court should not dismiss the petition *sua sponte*, much less do so without prior notice to the petitioner." *Id.* at 525.

[3] The Respondent does not question the merits of Petitioner's challenge to his Louisiana enhanced sentence on the basis of the unconstitutionality of the underlying Mississippi guilty pleas. Rather, the Respondent claims that, under *Custis*, the fact that Petitioner was represented by counsel ends the inquiry into the constitutionality of the underlying Mississippi convictions. *See* Brief for Respondent at 45, n. 32. *Custis*, however, concerned the extent to which a federal criminal defendant could attack a prior conviction used for enhancement in the context of federal sentencing. This Court concluded that, in that setting, an attack on the prior conviction was limited to a determination of whether the conviction was obtained in violation of the right to counsel. 511 U.S. at 487. *Custis* is not pertinent to Petitioner's claim. Thus, the lack of actual prejudice is not clearly manifest from the record here.

a procedural bar evolving from the law of Mississippi would ultimately derail petitioner's federal habeas petition." Brief for Respondent at 48 (emphasis added).

Indeed, Petitioner had no indication from the State of Louisiana or from any court, including the Fifth Circuit as late as at the oral argument in the case, that a procedural default defense based upon Mississippi post-conviction procedural law would become an issue in a case involving custody supported by a Louisiana judgment. Because the court of appeals did not give him fair notice and an opportunity to be heard, Petitioner was not able to argue the insufficiency of the Mississippi procedural rule, as applied to a Louisiana judgment, to limit review of his constitutional claim. *See Ford v. Georgia*, 498 U.S. 411, 423-424 (1991). Moreover, Petitioner had no opportunity to address the validity of the application of a Mississippi procedural rule in this context in light of the concerns of comity and federalism underlying the rule of procedural default and cause and prejudice. It is fundamentally unfair to deny the Petitioner a merits review of his claim without giving him any opportunity to address the many important and complex issues raised by the appellate court's *sua sponte* invocation of a procedural default based on the law of the state other than the state whose judgment is at issue.

Counsel acting as an advocate for the Petitioner may have made a difference in the resolution of these issues in the lower court. Counsel and Petitioner were denied this opportunity, however, and this case should be remanded so that counsel may assist Petitioner in addressing what has become the determinative issue in the case.

II. THE PANEL MAJORITY'S OPINION BELOW IS NOT CONSISTENT WITH *GRANBERRY V. GREER*

The opinion below does not even cite *Granberry v. Greer*, 481 U.S. 129 (1987). Naturally, the considerations enunciated in *Grandberry* informing a federal court's exercise of discretion to invoke *sua sponte* a defense of exhaustion waived by the State were not considered in the text of the opinion. Nevertheless, the Respondent devotes the majority of its brief on the merits (unlike its earlier brief in opposition) to an attempt to establish that the court of appeals' decision is consistent with *Granberry*. The opinion below cannot be read so generously.

The majority opinion makes no reference to Respondent's failure to assert the defense of procedural default at any point in this litigation.[4] While the court did not specifically rule that the procedural default defense could never be waived, its omission of any reference to the Respondent's failure to raise the defense certainly suggests that the court did not believe that omission had any significance. This is contrary to this Court's holdings that procedural default is an affirmative defense the State is obligated to raise. *See Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996). It is also contrary to this Court's "middle course" adopted in *Granberry* in the face of a State's failure to assert timely the defense of exhaustion. *See Granberry, supra*, 481 U.S. at 131-133.

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[4] Nevertheless, the panel majority was certainly aware of Respondent's failure to assert a procedural default bar as this was recognized in Judge Parker's dissenting opinion. JA 97 ("By failing to raise the procedural default as a defense, the State lost the right to assert that defense.").

Even under the discretionary middle course approach adopted in *Granberry*, the Fifth Circuit's opinion cannot be upheld. In the present case, the Louisiana State court judgment by which the Petitioner is held in custody in a Louisiana prison does not rest on any violation of Louisiana's procedural rules. Nor is the Louisiana State court judgment based upon Petitioner's default of Mississippi's procedural rules. Thus, a federal court decision on the merits of Petitioner's claim challenging his Louisiana custody based on the unconstitutionality of his underlying Mississippi convictions does not undermine the interests of the State of Louisiana in enforcing its laws or correcting its own mistakes. Under these circumstances, there are no concerns of comity and federalism that come into play, and the federal court should decide Petitioner's claim on the merits. Nevertheless, the Respondent urges that the State of Mississippi has an interest in barring untimely collateral attacks on its own final judgments that the opinion below recognizes by invoking a supposed Mississippi procedural default rule to bar a merits review of Petitioner's claim.[5] *See* Brief for Respondent at 32. Further, Respondent argues that "even though the State of Louisiana appeared as the party respondent, comity and federalism issues were implicated given that Trest had not afforded the State of Mississippi, in the first

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[5] Yet the Respondent admits that "[a] Louisiana court obviously reviewing this matter in the first instance would only determine the validity of an out-of-state plea limited to its use for enhancement purposes only." Brief of Respondent at 24, n. 22. And further: "The State of Louisiana has no authority to invalidate a Mississippi conviction in the first instance." Brief of Respondent at 24, n. 23.

instance, the opportunity to rule upon alleged constitutional infirmities of Mississippi convictions." Brief of Respondent at 30.[6]

The fallacy in the Respondent's arguments is that the concerns of comity and federalism and the respect for a State's interest in correcting its own mistakes reflected in

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[6] The State of Mississippi appearing as *amicus curiae* in support of the Respondent, along with the States of Florida, Montana, and Nevada, does not specify Mississippi's interest in applying its procedural rules to bar consideration of a challenge by a prisoner in custody pursuant to a Louisiana judgment when that challenge involves the underlying Mississippi conviction only insofar as it is used to enhance a Louisiana sentence, other than to state: "[b]y holding the claim was procedurally barred, the Court of Appeals was promoting judicial economy, the interest of federalism, comity and finality of state court judgments." Brief of the State of Mississippi And 3 States As *Amici Curiae* In Support Of Respondent at 21. Both *amici curiae* and the Respondent seem to suggest that the Fifth Circuit, since it is familiar with the procedural rules of the states within its circuit – Louisiana, Mississippi and Texas – should readily apply those rules to protect the interests of those states. Brief of The State Of Mississippi And 3 States As *Amici Curiae* In Support of Respondent at 22; Brief of Respondent at 20-21. If Petitioner's prior convictions had arisen in a state outside of the Fifth Circuit, *amici curiae* and Respondent would apparently not see the need for the Fifth Circuit or a federal district court within the Fifth Circuit to take the time and effort to become familiar with the post conviction procedural rules of that state (potentially any one or all of the other 47 states) in order to determine whether that state's rule, like Mississippi's, require that its conviction be challenged timely in state post conviction proceedings. It is difficult to understand why the interests of the states within the Fifth Circuit in the application of their procedural rules in a challenge to a Louisiana sentence would be greater (if any such interest existed) than the interests of the other 47 states.

the rule of procedural default arise in connection with a State court judgment (and the independent and adequate state ground upon which that judgment rests) pursuant to which a petitioner is in custody. Here, the Petitioner is not in custody pursuant to a Mississippi State court judgment. Nor is the Louisiana judgment pursuant to which Petitioner is in custody based on any adequate and independent Mississippi procedural ground. Moreover, as the Respondent admits, a Louisiana court reviewing a final Mississippi conviction would be limited to a determination of whether under Louisiana and federal constitutional law the conviction should have the collateral consequence of serving as a basis for a Louisiana enhanced sentence. The Mississippi conviction at issue nevertheless remains final.

Rather than basing its decision on a considered judgment of the competing interests at stake, the court below concluded that it was precluded from reviewing the merits of the Petitioner's challenge to his Louisiana sentence as enhanced by unconstitutional Mississippi convictions. JA 90. It is clear from the opinion that the Fifth Circuit concluded that it had no discretion but was required to raise and enforce *sua sponte* the procedural default. As the Respondent concedes, this is not the law. Accordingly, the judgment of the court of appeals must be vacated.

III. THE RESPONDENT'S CLAIM OF FAILURE TO EXHAUST, RAISED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS, MUST BE DEEMED WAIVED

The Respondent argues for the first time in its brief on the merits that Petitioner's *Boykin v. Alabama*, 395 U.S. 228 (1969), challenge to his Louisiana enhanced sentence on the basis of the unconstitutionality of his Mississippi convictions was not previously raised in the Louisiana State courts. *See* Brief of Respondent at 11, n. 13, 12, 22 n. 21, 28, 39 and n. 27, 40-43. Moreover, the Respondent suggests that Petitioner's claim challenging the unconstitutionality of the Mississippi convictions that was advanced in the body of his memorandum of law attached to his state uniform application for post-conviction relief, but not specifically listed in the statement of claims at the beginning of that memorandum, *see* JA 8, 9, 19-20, was not fairly presented to the State courts as a result. Brief for Respondent at 43.[7]

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[7] In his memorandum of law filed in the state court, the Petitioner urged that the Mississippi convictions could not be used for enhancement purposes because the Mississippi trial records failed to show that Petitioner had been advised of his right to appeal his conviction and sentence. JA 19. In support, the Petitioner cited to *State v. Robicheaux*, 412 So.2d 1313, 1316-17 (La. 1982), wherein the Louisiana Supreme Court concluded that a guilty plea violated *Boykin* and that the conviction supported by that plea could not be used to enhance the defendant's sentence. Additionally, the Petitioner alleged that "[i]f Petitioner's Mississippi felony convictions *are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court*, then Louisiana Constitution Article 1, Section 19 [providing for a right of judicial review based upon a complete record of all evidence upon which a judgment is based], disallows enhancement punishment from those unconstitutional convictions in Mississippi." JA 20 (emphasis added). The State courts were certainly aware that Petitioner was challenging the use of the underlying Mississippi convictions as a basis for enhancement of his Louisiana sentence based on the inadequacies of his Mississippi guilty plea colloquy. While the State court may have chosen to ignore the claim as set forth in the body of the memorandum, that is not determinative of whether the claim is exhausted. *See Smith v. Digmon*, 434 U.S. 332 (1978). Nor did the Petitioner's filing of the transcript of the guilty plea in the federal district court fundamentally alter the substance of the claim as presented to the State courts. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

This argument is clearly waived as the Respondent concedes its failure to raise any exhaustion defense at any time, *see* Brief of Respondent at 18 n. 19, 29, 39 n. 28, despite countless opportunities to do so. Given that the Respondent did not raise exhaustion in its brief in opposition to Petitioner's request for certiorari review, Respondent's assertion of exhaustion for the first time in its brief on the merits comes too late to be considered by this Court. *See, e.g., Schiro v. Farley*, 510 U.S. 222, 228-229 (1994) (where State failed to raise *Teague* argument in its brief in opposition to the petition for a writ of certiorari, Court would not address the issue as a basis in support of the judgment below); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (State's failure to inform this Court prior to grant of certiorari review that petitioner had arguably conceded point below does not provide basis for the Court to abstain from addressing the question before it); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (because of respondent's failure to bring to attention of the Court a nonjurisdictional defect no later than in

Respondent's brief in opposition to the petition for certiorari, the defect is deemed waived). Accordingly, the Respondent's late argument that the Petitioner failed to exhaust his claim based on *Boykin* should be deemed waived.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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